Federal Court  Cour fédérale

Date: 20200403

Docket: T-524-19

Citation: 2020 FC 489

Ottawa, Ontario, April 3, 2020

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

PAUL MACFARLANE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision made on February 18, 2019 by the Entitlement Appeal Panel of the Veterans Review and Appeal Board [Appeal Panel], in which it found that the Applicant was not entitled to additional pension benefits for ischemic heart disease under section 32 of the *Royal Canadian Mounted Police Superannuation Act*, RSC 1985, c R-11 [*RCMP Superannuation Act*] and section 21(2) of the *Pension Act*, RSC 1985, c P-6 [the Decision].

II. **Background Facts**

[2] The Applicant, Paul MacFarlane, is a retired member of the RCMP. After suffering a heart attack, he was medically discharged from the RCMP and began receiving a pension. The Applicant applied for an additional pension entitlement on the basis that his RCMP service contributed to his heart disease. The Appeal Panel affirmed the decisions of the delegate of the Minister of Veterans Affairs [Minister's delegate] and the Entitlement Review Panel [Review Panel] and found that the Applicant was not entitled to an additional pension amount.

[3] For the reasons that follow, this judicial review is dismissed.

[4] The Applicant joined the RCMP in December 1975 and served in security roles in Ontario and Quebec and with detachments across Atlantic Canada. On September 17, 2000, the Applicant suffered a large non - Q wave myocardial infarction. The Applicant was subsequently diagnosed with ischemic heart disease.

[5] On October 20, 2000, the Applicant applied to the Department of Veterans Affairs under section 32 of the *RCMP Superannuation Act* and section 21(2) of the *Pension Act* for a disability pension related to his ischemic heart disease. The Applicant claimed that the stress from his RCMP service, along with shift work, contributed to his heart attack and ischemic heart disease.

[6] On July 18, 2001, the Minister's delegate denied the Applicant's pension entitlement for heart disease. The Minister's delegate found that there was "no medical evidence to support that

stress, or the duties of [the Applicant's] R.C.M.P. Service was a causative factor in the development of [his] claimed condition."

[7] The Applicant appealed this decision to the Review Panel where he submitted a medical report from his family doctor, Dr. Shea, and documentation from his personnel file.

[8] On October 2, 2011, the Review Panel found that the Applicant was not entitled to an additional pension benefit for heart disease, as he did not provide an "up-to-date convincing and detailed objective medical opinion which would link the Applicant's condition diagnosed in 2000 to the Applicant's R.C.M.P. duties of 25 years, which he indicated to the Panel, he liked very much".

III. **Legislative Framework**

[9] This case is governed by the Royal Canadian Mounted Police Superannuation Act [*RCMP Superannuation Act*], the *Pension Act*, and the *Veterans Review and Appeal Board Act*, SC 1995, c 18 [*VRAB Act*]. The relevant provisions are included at Appendix A.

A. *RCMP Superannuation Act*

[10] The *RCMP Superannuation Act*, RSC 1985, c R-11 provides at section 32 that a service member is entitled to an additional pension amount "if the injury or disease – or the aggravation of the injury or disease – resulting in the disability or death in respect of which the application for the award is made arose out of, or was directly connected with, the person's service in the Force".

B. *Pension Act*

[11] The *Pension Act* provides at section 2 that it is to be liberally construed and interpreted so that the recognized obligation of the people and Government of Canada to provide compensation to those members of the forces who have been disabled or have died as a result of service may be fulfilled.

[12] Disability is defined in section 3 of the *Pension Act* as "the loss or lessening of the power to will and to do any normal mental or physical act," but no specific disabilities are enumerated in the relevant legislation or regulations.

C. *VRAB Act*

[13] Section 3 of the *VRAB Act* provides that it and any other legislation conferring powers on the Board are to be liberally construed and interpreted, so that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled. Section 40 mandates that Board proceedings be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

[14] Most importantly, section 39 of the *VRAB Act* sets out how the Board is to treat evidence. It states that the Board shall:

(a) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;	a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;
(b) accept any uncontradicted	b) il accepte tout élément de preuve non contredit que lui

evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and	présente celui-ci et qui lui semble vraisemblable en l'occurrence;
(c) resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.	c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

IV. **Decision Under Review**

[15] The Applicant appealed the Review Panel's decision to the Appeal Panel. He submitted an updated personal statement, updated medical record, clinical psychology report, service health records, and updated medical literature about the stress experienced by police officers.

[16] On February 18, 2019, the Appeal Panel found that the Applicant was not entitled to an additional pension amount for heart disease.

[17] The Appeal Panel found that the Applicant had proven his diagnosis of ischemic heart disease, and that the condition had resulted in ongoing disability. However, the Appeal Panel found that the Applicant's heart disease was not caused, aggravated, or otherwise related to his RCMP service.

[18] In reaching this conclusion, the Appeal Panel noted that the Applicant had been exposed to numerous stressful events in his career and that he had been granted a full pension entitlement for post-traumatic stress disorder.

[19] The Appeal Panel stated that section 39 of the *VRAB Act* required it to draw every reasonable inference in favour of the Applicant, accept any uncontradicted evidence presented by the Applicant that it considered to be credible in the circumstances, and resolve in favour of the Applicant any doubt, in the weighing of the evidence, as to whether the Applicant has established a case.

[20] The Appeal Panel noted that the jurisprudence has clarified that section 39 does not "relieve [Applicants] of the burden of proving the facts needed in their cases to link the claimed condition to service", and that the Applicant must show that there is a sufficient causal connection between the claimed condition and his RCMP service.

[21] The Appeal Panel further noted that the Applicant's burden of proving the necessary facts required him to establish entitlement to a pension on a balance of probabilities. Citing *Cole v Canada (Attorney General)*, 2015 FCA 119 the Appeal Panel found that establishing this connection required the Applicant to show a "significant causal connection" between his claimed condition and his RCMP service.

[22] The Appeal Panel found that the record contained conflicting medical evidence between the cardiologist, Dr. McMillan and the Applicant's family physician, Dr. Shea.

[23] Dr. McMillan saw the Applicant at Queen Elizabeth Hospital, Charlottetown on September 17, 2000, soon after the Applicant's heart attack. The Appeal Panel noted that Dr. McMillan's report referred to the Applicant's "strong family history of ischemic heart disease" and other risk factors, but did not identify work stress as a risk factor.

[24] The report from the Applicant's family doctor, Dr. Shea, was a completed Medical Questionnaire on Cardiorespiratory Conditions, dated November 13, 2017, together with Additional Comments by Dr. Shea where she stated that she felt the Applicant had been in physical and emotionally stressful situations that resulted in adrenaline being released and she felt his occupation was a contributory factor to his condition.

[25] The Appeal Panel noted that Dr. Shea's report, prepared in support of the Applicant's claim, did not explain why work stress was given "considerably more commentary and emphasis" than the Applicant's other risk factors that she also recognized.

[26] The Appeal Panel noted that Dr. Shea was better positioned to provide care and management of the Applicant's complex health issues, but it preferred the cardiologist's report because it was contemporaneous and prepared by a specialist.

[27] The Appeal Panel affirmed the decision of the Review Panel and found that the Applicant was not entitled to an additional pension benefit for ischemic heart disease.

V. **Issues and Standard of Review**

[28] The Applicant has put forward a number of issues based on perceived errors by the Appeal Panel. He states that it comes down to whether the Appeal Panel's conclusion that he failed to provide sufficient evidence to establish his claim was reasonable.

[29] The perceived errors said to be made by the Appeal Panel are:

- the finding that there was conflicting medical evidence;
- the failure to accept Dr. Shea's opinion that service-related stress was a contributing factor to the Applicant's ischemic heart disease;
- the failure to consider the updated medical literature submitted by the Applicant.

[30] This application was argued shortly before the Supreme Court of Canada released the decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] in which it restated how a reviewing court is to conduct a reasonableness review.

[31] There is now a clear statement that when the merits of an administrative decision are judicially reviewed, the applicable standard of review is presumed to be reasonableness, subject to certain exceptions, none of which apply on these facts: *Vavilov* at paras 23 and 33.

[32] It is no longer necessary to consider whether prior jurisprudence has satisfactorily determined the standard of review. However, I note that it has long been held that the appropriate standard of review for an Appeal Panel's assessment of the medical evidence and its assessment of whether the Applicant's medical condition, in this case, ischemic heart disease, arose out of or was directly connected with his RCMP service, involves questions of fact or mixed fact and law and is subject to review on the standard of reasonableness: *Wannamaker v Canada (Attorney General)*, 2007 FCA 126 at para 12.

[33] The focus of previous jurisprudence that addressed judicial review of administrative decisions has not been changed by *Vavilov*. The well-known administrative law requirement that

a tribunal's reasons should demonstrate that a decision is transparent, intelligible and justified remains alive and well: *Vavilov* at para 15.

[34] As set out in the following analysis, I find that the Decision adheres to the *Vavilov* requirement that "a reasonable decision is one that is based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker." When that requirement is met, a reviewing court is required to defer to the decision: *Vavilov* at para 85.

[35] I note that in his Notice of Application, the Applicant alleged that there was a breach of procedural fairness because the Review Panel consulted the Merck Manual and failed to give the Applicant an opportunity to make submissions or provide further medical evidence to respond.

[36] This allegation was not pursued in the written submissions nor at the hearing. In any event, when it was raised before the Appeal Panel, it was found that the risk factors set out in the Merck Manual were also set out in the cardiology report and in the Statement of Case before the review panel, so the Applicant had the opportunity to address or challenge that information.

VI. **Was there conflicting medical evidence?**

[37] The crucial difference between the parties is whether or not there was conflicting or, as stated in subsection 39(b) of the *VRAB Act*, contradictory medical evidence between the cardiology report of Dr. McMillan in September 2000 and the family physician medical report of Dr. Shea in November 2017.

[38] This is important because subsection 39(b) of the *VRAB Act* requires that any uncontradicted evidence presented by the Applicant be accepted if it is considered to be credible.

[39] If an Appeal Panel finds that there is contradictory evidence then it is not compelled by the legislation to accept an Applicant's evidence. Such evidence must still be considered and the Appeal Panel must provide reasons for accepting or rejecting it in whole or in part.

[40] The Applicant submits that the Appeal Panel unreasonably concluded there was conflicting medical evidence between the reports of the two doctors. He notes that, unlike Dr. Shea, Dr. McMillan did not mention that work stress contributed to the Applicant's heart disease, nor did he have reason to comment on whether it arose out of or was connected with his RCMP service. Therefore, Dr. Shea simply provided additional opinion evidence that was absent from Dr. McMillan's report.

[41] The Respondent on the other hand submits that the two medical reports offer contradictory conclusions as to the origin and contributing factors leading to the Applicant's heart condition. Dr. McMillan considered hereditary factors while Dr. Shea did not.

[42] Having reviewed the two reports, it is my opinion that the Appeal Panel did not err in finding it was faced with conflicting medical evidence.

[43] Dr. McMillan's report discusses the Applicant's family history and risk factors, stating:

> Father died of an MI at 50 with a strong family history of ischemic heart disease in fourth and fifth decade in his entire family. Mother is healthy.
>
> This 45-year-old male, whose risk factors include obesity, relatively sedentary lifestyle, hyperlipidemia, previous light smoking, and family history, presents with (*sic*) appears to be new onset unstable angina and non Q wave anterior MI needs to be ruled out.

[44] Regarding the "Medical Questionnaire: Cardiorespiratory Conditions" form completed by Dr. Shea on October 23, 2017, the Appeal Panel noted that she mentioned the Applicant had been diagnosed with mixed dyslipidemia in 1995, which is now controlled, and in 2011 he had been diagnosed with diabetes mellitus. Dr. Shea also noted that his BMI was 33.

[45] The Appeal Panel was concerned that there was a lack of discussion by Dr. Shea as to why, given the several risk factors and health factors noted in the Applicant's patient history and in her examination, she gave the work stress factor considerably more commentary and emphasis without explaining the lack of weight she gave to the other factors.

[46] The Applicant admits that Dr. Shea stated she could not cite information to show a direct correlation between stress and his cardiac condition. The best she could say, based on her experience as the Applicant's family physician, was that "stress associated with his occupation was certainly a contributing factor to the onset of Mr. MacFarlane's cardiac condition at such a young age."

[47] A "contributing factor" is not necessarily evidence of a "significant causal connection".

[48] It is the role of the Appeal Panel to determine whether, on a balance of probabilities, the Applicant has established facts to prove his entitlement to the additional pension benefits he was seeking and it is he who must prove causation between the claimed incident and the condition put forward: *Boisvert v Canada (Attorney General)*, 2009 FC 735 at para 28.

[49] The Appeal Panel was concerned that Dr. Shea did not address why she gave work stress so much emphasis but did not discuss the other risk and health factors.

[50] In her additional comments, Dr. Shea states that she "feels" that the Applicant's occupation was a "contributory factor". When considering that evidence against the number of health risk and family factors identified by the cardiologist in his report it was open to the Appeal Panel to conclude that the medical reports were contradictory. As a result, the Appeal Panel could, and did, prefer the contemporaneous report by the specialist.

[51] The Appeal Panel described the conflicting medical evidence this way:

> one piece of evidence being a consultant's record that was created by a cardiologist in reviewing the contemporaneous state of the Appellant, reviewing his history and risk factors, and providing recommendations for his care; and another piece of evidence from his family physician prepared in support of his claim. While the Appeal Panel acknowledges that the family physician is better positioned to provide the care and management of the Appellant's complex health issues, the Appeal Panel prefers the 2000 Consultation Record as evidence that is both contemporaneous and of a specialist.

[52] The Applicant bore the burden of proving his claim on a balance of probabilities. He was required to show that it is more likely than not that his injury or disease "arose out of or was

directly connected with his military service". The Appeal Panel was not persuaded by him or by the medical evidence that he had provided sufficient evidence to meet that burden.

[53] The Appeal Panel's reasoning is supported by this passage from *Canada (Attorney General) v Wannamaker*, 2007 FCA 126, at para 29:

> [29] It is argued that the Board failed to apply section 39 of the Veterans Review and Appeal Board Act. I do not accept that argument. The Board was faced with contradictory evidence about whether Mr. Wannamaker suffered back injuries in 1959 and 1961 as he claimed. The only direct evidence came from Mr. Wannamaker himself. The Board noted that Mr. Wannamaker first asserted his claim some 30 years after the injuries were alleged to have occurred. That is a factor that weakens the reliability of his evidence and therefore its credibility. Mr. Wannamaker's evidence is also contradicted by the contemporaneous medical records. Thus, this is not a situation that engages paragraph 39(b), which requires the Board to "accept any uncontradicted evidence" presented by the applicant that the Board considers "credible in the circumstances." In my view, it was not unreasonable for the Board to reject Mr. Wannamaker's evidence.

[54] Given the evidence in the underlying record and referred to above, it was reasonably open to the Appeal Panel to draw the conclusion it did that there is not sufficient evidence to prove that the Applicant's heart disease was caused, aggravated, or otherwise related to his RCMP service.

[55] There are two other alleged errors left to examine.

VII. **The Appeal Panel did not err in considering Dr. Shea's report**

[56] The second alleged error was that the Appeal Panel erred in considering Dr. Shea's report. Having found, for reasons already given, that it was open to the Appeal Panel to prefer the contemporaneous report by the specialist over that of Dr. Shea, it is clear that the Appeal Panel did consider Dr. Shea's report but ultimately preferred the cardiology report. I am not persuaded that in doing so it erred.

VIII. **The Appeal Panel did not fail to consider the updated medical literature**

[57] That leaves for analysis the alleged error that the Appeal Panel failed to consider the updated medical literature submitted by the Applicant.

[58] Firstly, I note that a decision-maker is assumed to have weighed and considered all the evidence presented to it unless the contrary is shown: *Boulos v Canada (Public Service Alliance),* 2012 FCA 193 at para 11.

[59] Secondly, the Appeal Panel acknowledged that the Applicant submitted "five exhibits and five attachments" and it quoted from one of the articles emphasized by his advocate. It also noted that one article discussed the connection between stress and cardiovascular disease for police officers.

[60] The Appeal Panel did not fail to consider the updated medical literature. Rather, after doing so, it did not draw the conclusion the Applicant would have preferred.

IX. **Conclusion**

[61] The Decision is reasonable. The reasons provided by the Appeal Panel permit the Applicant and this Court to understand both how and why the Decision was made. The Decision bears the hallmarks of reasonableness as it exhibits justification, transparency and intelligibility and, the outcome falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

[62] As required by *Vavilov*, it is internally coherent and there is a rational chain of analysis. The outcome is justified in relation to the facts, which are supported by the underlying record and the law, which was clearly identified and applied by the Appeal Panel. I am therefore required to defer to it: *Vavilov* at para 85.

[63] In addition, *Vavilov* confirms that the burden is on the party challenging the decision to show that it is unreasonable and, as a reviewing court, I must be satisfied that there are sufficiently serious shortcomings that are more than merely superficial or peripheral to the merits of the decision. The reviewing court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable: *Vavilov* at para 100.

[64] The Applicant has not pointed to any such shortcomings or flaws. In effect, the Applicant is asking this Court to reweigh the evidence and come to a different conclusion than the Appeal Panel. Absent exceptional circumstances, a reviewing court will not interfere with a tribunal's factual findings provided the decision is justified in light of the facts: *Vavilov* at paras 125 - 126.

[65] For all the foregoing reasons, the application is dismissed, without costs.

JUDGMENT in T-524-19

THIS COURT'S JUDGMENT is that the application is dismissed, without costs.

"E. Susan Elliott"
Judge

APPENDIX "A"

Royal Canadian Mounted Police Superannuation Act, RSC 1985, c R-11

Eligibility for awards under *Pension Act*

32 Subject to this Part and the regulations, an award in accordance with the Pension Act shall be granted to or in respect of the following persons if the injury or disease — or the aggravation of the injury or disease — resulting in the disability or death in respect of which the application for the award is made arose out of, or was directly connected with, the person's service in the Force:

(a) any person to whom Part VI of the former Act applied at any time before April 1, 1960 who, either before or after that time, has suffered a disability o

(b) any person who served in the Force at any time after March 31, 1960 as a contributor under Part I of this Act and who has suffered a disability, either before or after that time, or has died.

Admissibilité à une compensation conforme à la Loi sur les pensions

32 Sous réserve des autres dispositions de la présente partie et des règlements, une compensation conforme à la Loi sur les pensions doit être accordée, chaque fois que la blessure ou la maladie — ou son aggravation — ayant causé l'invalidité ou le décès sur lequel porte la demande de compensation était consécutive ou se rattachait directement au service dans la Gendarmerie, à toute personne, ou à l'égard de toute personne :

a) visée à la partie VI de l'ancienne loi à tout moment avant le 1er avril 1960, qui, avant ou après cette date, a subi une invalidité ou est décédée;

b) ayant servi dans la Gendarmerie à tout moment après le 31 mars 1960 comme contributeur selon la partie I de la présente loi, et qui a subi une invalidité avant ou après cette date, ou est décédée.

Pension Act, RSC 1985, c P-6

Construction

2 The provisions of this Act shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to provide compensation to those members of the forces who have been disabled or have died as a result of military service, and to their dependants, may be fulfilled.

Règle d'interprétation

2 Les dispositions de la présente loi s'interprètent d'une façon libérale afin de donner effet à l'obligation reconnue du peuple canadien et du gouvernement du Canada d'indemniser les membres des forces qui sont devenus invalides ou sont décédés par suite de leur service militaire, ainsi que les personnes à leur charge.

Definitions

3 (1) In this Act…

disability means the loss or lessening of the power to will and to do any normal mental or physical act; (invalidité)…

Définitions

3 (1) Les définitions qui suivent s'appliquent à la présente loi.

invalidité La perte ou l'amoindrissement de la faculté de vouloir et de faire normalement des actes d'ordre physique ou mental. (disability)

Service in militia or reserve army and in peace time

21 (2) In respect of military service rendered in the non-permanent active militia or in the reserve army during World War II and in respect of military service in peace time,

(a) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall, on application, be awarded to or in respect of the member in accordance with the rates for basic and

Milice active non permanente ou armée de réserve en temps de paix

21 (2) En ce qui concerne le service militaire accompli dans la milice active non permanente ou dans l'armée de réserve pendant la Seconde Guerre mondiale ou le service militaire en temps de paix :

a) des pensions sont, sur demande, accordées aux membres des forces ou à leur égard, conformément aux

additional pension set out in Schedule I;	taux prévus à l’annexe I pour les pensions de base ou supplémentaires, en cas d’invalidité causée par une blessure ou maladie — ou son aggravation — consécutive ou rattachée directement au service militaire;

Veterans Review and Appeal Board Act, SC 1995, c 18

Construction

3 The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled.

[. . .]

Rules of evidence

39 In all proceedings under this Act, the Board shall

(a) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;

(b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and

(c) resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.

Principe général

3 Les dispositions de la présente loi et de toute autre loi fédérale, ainsi que de leurs règlements, qui établissent la compétence du Tribunal ou lui confèrent des pouvoirs et fonctions doivent s'interpréter de façon large, compte tenu des obligations que le peuple et le gouvernement du Canada reconnaissent avoir à l'égard de ceux qui ont si bien servi leur pays et des personnes à leur charge.

[. . .]

Règles régissant la preuve

39 Le Tribunal applique, à l'égard du demandeur ou de l'appelant, les règles suivantes en matière de preuve :

a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;

b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;

c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

LAURA E. ROBINSON	FOR THE APPLICANT
LAWRENCE DAVID	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Borden Ladner Gervais LLP Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT